



with the requirements of *Apprendi v. New Jersey*<sup>1</sup> and *Ring v. Arizona*,<sup>2</sup> as well as Delaware law. Defendant's motion is denied.

**Issues.** Defendant argues that the death penalty statute violates the Sixth Amendment right to trial by jury in two ways. First, Defendant challenges the fact that, if the State proves to a unanimous jury the existence a statutory aggravating circumstance beyond a reasonable doubt, it is the trial judge, not the jury, who will determine whether the aggravating circumstances outweigh the mitigating circumstances. According to Defendant, this determination must be made by a jury. Second, Defendant asserts that the result of the final weighing process must be found beyond a reasonable doubt rather than by a preponderance of the evidence. The State cites numerous cases that show that Delaware's sentencing system is constitutional.

***Trial judge engages in the weighing process.*** In *Apprendi v. New Jersey*, the United States Supreme Court held that other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt.<sup>3</sup> In *Ring v. Arizona*, the Court applied *Apprendi* to the Arizona death penalty sentencing statute and found it to be unconstitutional because it required a judge to make factual findings as a prerequisite to the

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<sup>1</sup>530 U.S. 466 (2000).

<sup>2</sup>536 U.S. 584 (2002).

<sup>3</sup>530 U.S. 466 (2000).

imposition of the death penalty.<sup>4</sup> The Court held that the Arizona statute violated the defendant's Sixth Amendment right to trial by jury.<sup>5</sup>

Following the issuance of *Ring*, Delaware's General Assembly amended 11 *Del. C.* § 4209. The amended statute requires that the existence of a statutory aggravator be found by the jury, or by the judge if sitting without a jury, beyond a reasonable doubt. § 4209 (e). The amended statute has also come attack but has been found to meet constitutional standards, as shown below. In *Brice v. State*,<sup>6</sup> the Delaware Supreme Court accepted four questions of law certified under Supreme Court Rule 41. The Court made clear that under the amended statute the jury is required to find, unanimously and beyond a reasonable doubt, the existence of at least one statutory aggravating circumstance before the judge may consider imposing the death sentence.<sup>7</sup> The *Brice* Court found the statute to be constitutional and to comport with *Ring v. Arizona*. The Court has not deviated from this position.

The Court in *Swan v. State* reaffirmed the constitutionality of our death penalty statute, stating that *Brice* had put to rest any issues pertaining to the factfinding role of the jury and the trial judge. "Once a jury finds unanimously and beyond a reasonable doubt, the existence of at least one statutory aggravating circumstance, the defendant becomes death

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<sup>4</sup>*Ring v. Arizona*, at 603-604.

<sup>5</sup>*Id.*

<sup>6</sup>815 A.2d 314 (Del. 2003).

<sup>7</sup>*Id.* at 322.

eligible and *Ring*'s constitutional requirement of jury fact-finding is satisfied."<sup>8</sup> At that point, the trial judge, who is the final arbiter of the sentence, appropriately begins the weighing process.

In *Starling v. State*, the Court rejected the argument that the trial judge impermissibly makes the final sentencing decision.<sup>9</sup> That decision cannot be made without the jury's finding of a statutory aggravator:

Although a judge cannot sentence a defendant to death without finding that the aggravating factors outweigh the mitigating factors, **it is not that determination that increased the maximum punishment. Rather, the maximum punishment is increased by the jury's unanimous finding beyond a reasonable doubt of the statutory aggravator.** At that point a judge can sentence a defendant to death, but only if the judge finds that the aggravating factors outweigh the [mitigating] factors. Therefore the weighing of aggravating circumstances against mitigating circumstances does not increase the punishment. Rather, it ensures that the punishment imposed is appropriate and proportional.<sup>10</sup>

This quotation regarding the maximum punishment available leads naturally to a discussion of *Blakeley v. Washington*,<sup>11</sup> which Defendant puts forth as support for his position. In *Blakeley*, the Court held that the state court's sentencing of the defendant to more than three years above the 53-month statutory maximum on the basis of the judge's

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<sup>8</sup>*Swan v. State*, 820 A.2d 342, 359 (Del. 2003) (citing *Brice v. State*, 815 A.2d 314 (Del. 2003)).

<sup>9</sup>882 A.2d 747 (Del. 2005).

<sup>10</sup>*Id.* at 757 (citations omitted) (emphasis added).

<sup>11</sup>542 U.S. 296 (2004).

finding of deliberate cruelty on the part of the defendant violated the defendant’s right to trial by jury. Although not a death penalty case *Blakely* has relevance here because the issue pertained to a defendant receiving a “sentence greater than what state law authorized on the basis of the verdict alone.”<sup>12</sup> Our capital sentencing law requires a jury, not a judge, to make a unanimous finding regarding the existence of a statutory aggravator – that is the crucial finding which renders a defendant eligible for the death penalty and permits the trial judge to impose it. The Court finds that our death penalty statute is consistent with the principles set forth in *Blakeley*.

In *Ortiz v. State*, the Delaware Supreme Court found that our hybrid system of sentencing, which provides for the jury to find the defendant death eligible and the judge to impose the death penalty, does not violate the right to trial by jury.<sup>13</sup> The Court stated that Ortiz became death-eligible under *Apprendi* and *Ring* when his jury unanimously found beyond a reasonable doubt the existence of one of the statutory aggravating circumstances. The Court observed that under *Brice v. State*,<sup>14</sup> *Blakely v. Washington*<sup>15</sup> and *United States v. Booker*,<sup>16</sup> the statutory structure of Delaware’s capital sentencing procedure comports with

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<sup>12</sup>*Id.*

<sup>13</sup>*Ortiz v. State*, 869 A.2d 285 (Del. 2005).

<sup>14</sup>815 A.2d 314.

<sup>15</sup>542 U.S. 296 (2004).

<sup>16</sup>543 U.S. 220 (2005).

the standard set forth by the federal Supreme Court.<sup>17</sup> The Court finds that Delaware’s sentencing statute is consistent with *Ring*’s reminder that “[c]apital defendants, no less than non-capital defendants. . . are entitled to a jury finding of any fact on which the legislature conditions an increase in their maximum punishment.”<sup>18</sup>

For all these reasons, the Court concludes that Defendant’s argument that the jury must engage in the final weighing process is without merit.

***Standard for the final weighing process.*** Section 4209(d) states that the trial judge will make a finding as to the aggravators and mitigators by a preponderance of the evidence.<sup>19</sup> As recently as 2008, the Court in *Gattis v. State* found that the argument that the aggravating circumstances must outweigh the mitigating circumstances beyond a reasonable doubt overstated the *Apprendi* holding.<sup>20</sup> *Gattis* relied on *Brice*, in which the Court was asked to determine whether a jury must find beyond a reasonable doubt that all aggravating factors found to exist outweigh all mitigating factors found to exist.<sup>21</sup> In answering this

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<sup>17</sup>*Ortiz v. State*, 869 A.2d 285, 305-306 (Del. 2005).

<sup>18</sup>*Ring v. Arizona*, 536 U.S. at 584.

<sup>19</sup>Section 4209(d) provides in part:  
“[T]he Court, after considering the findings and recommendation of the jury and without hearing or reviewing any additional evidence, shall impose a sentence of death **if the Court finds by a preponderance of the evidence.** . . . that the aggravating circumstances found by the Court to exist outweigh the mitigating circumstances found by the Court to exist. . . .” (Emphasis added.)

<sup>20</sup>*Gattis v. State*, 955 A.2d 1276, 1289 (2008).

<sup>21</sup>*Brice v. State*, 815 A.2d at 318.

question in the negative, *Brice* observed that the standard for the Court's weighing process is a preponderance of the evidence.<sup>22</sup> This Court is satisfied that the preponderance of the evidence is the appropriate standard under the Sixth Amendment. It is a unanimous jury that finds beyond a reasonable doubt whether a defendant is death eligible, and the Delaware statute is therefore consistent with *Apprendi v. New Jersey*<sup>23</sup> and *Ring v Arizona*.<sup>24</sup>

Defendant asserts in conclusory fashion that cases from other jurisdictions support his argument that the weighing process must be conducted under the beyond a reasonable doubt standard. Defendant has not taken into account that each of these states has a different capital sentencing statute and that each case raises different issues. Nor does he acknowledge that a state can choose to expand a defendant's rights beyond what is required by the Constitution by imposing a higher burden of proof on the state.

Defendant directs our attention to the following cases. In *Woldt v. People*,<sup>25</sup> the Colorado Supreme Court held that a death penalty sentencing scheme which consisted of a judicial fact-finding process was unconstitutional under *Apprendi*. This is nothing like our statute and has no relevance to the issues at bar. In *State v. Whitfield*,<sup>26</sup> the Missouri Supreme Court held that under *Apprendi* eligibility for the death penalty must be determined

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<sup>22</sup>*Id.* at 322.

<sup>23</sup>530 U.S. 466 (2000).

<sup>24</sup>536 U.S. 584 (2002).

<sup>25</sup>64 P.3d 256 (Colo. 2003).

<sup>26</sup>107 S.W. 256 (Mo. 2003).

by a jury. This requirement is also part of Delaware's statute. In *Johnson v. State*, the Supreme Court of Nevada held that a statute violated the right to a jury trial in its provision for judges to make findings in a death penalty hearing when the jury was deadlocked.<sup>27</sup> Delaware has no such provision, In *Olson v. State*, the Wyoming Supreme Court observed that a capital sentencing scheme must genuinely narrow the class of persons eligible for the death penalty but remanded the case to the trial court because one of the aggravators was faulty. None of these cases sheds new light on the issue of whether the trial judge should conduct the weighing process by a preponderance of the evidence or by a reasonable doubt. This Court is satisfied that the Delaware statute, which mandates use of the preponderance standard, meets constitutional requirements under the Sixth Amendment right to trial by jury.

**Conclusion.** in *Starling v. State*,<sup>28</sup> the Delaware Supreme Court reiterated that under Delaware's amended statute, the jury makes a recommendation that "shall be given such consideration as deemed appropriate by the Court in light of the particular circumstances or details of the commission of the offense and the character and propensities of the offender. . . ."<sup>29</sup> Our Supreme Court has found this provision to be in conformity with federal standards time and again because it is the jury that finds the defendant to be death-eligible. The right to trial by jury is not violated by the trial judge imposing the sentence after a

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<sup>27</sup>59 P.3d 450 (Nev. 2002).

<sup>28</sup>882 A.2d 747 (Del. 2005).

<sup>29</sup>11 *Del. C.* § 4209(d)(1).

unanimous jury has found the existence of a statutory aggravating circumstance. Nor is it violated by the final weighing process being conducted by a preponderance of the evidence. These decisions have been addressed and resolved by the Delaware Supreme Court, and Defendant has not raised any procedural or substantive arguments that would lead to a different conclusion.

The *Apprendi* Court reminded us that “the jury trial guarantee was one of the least controversial provisions of the Bill of Rights. It has never been efficient; but it has always been free.”<sup>30</sup> It remains free in Delaware, and Defendant’s assertions do not prove otherwise.

Defendant’s motion for a declaratory judgment is ***DENIED***.

***IT IS SO ORDERED.***

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Richard F. Stokes, Judge

Original to Prothonotary

cc: Paula T. Ryan, Esquire  
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<sup>30</sup>*Apprendi*, 530 U.S. at 498.